REMITTITUR ABOLISHED AS AN UNNECESSARY PRACTICE LEADING TO INCONSISTENT RESULTS

Firestone v. Crown Center Redevelopment Corp., 693 S.W.2d 99 (Mo. 1985) (en banc)

In *Firestone v. Crown Center Redevelopment Corp.*,[1] the Missouri Supreme Court became the first state court to abolish the power of remittitur.[2]

Sally Firestone sustained severe injuries when suspended skywalks collapsed at the Hyatt Regency Hotel in Kansas City, Missouri.[3] Firestone brought suit against the owner of the hotel, Crown Center Redevelopment Corp. (Crown Center), to recover compensatory damages.[4] The jury awarded Firestone damages of fifteen million dollars as compensation for her injuries.[5] The trial judge, however, stating that the damage award was excessive, ordered Firestone to accept a 2.25 million dollar reduction in her award. If Firestone refused, the court would grant Crown Center a new trial.[6] Firestone accepted the remittitur,[7] but Crown Center appealed, claiming that the award was still excessive.[8]

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1. 693 S.W.2d 99 (Mo. 1985) (en banc).

2. If the . . . court determines that the verdict in a case is excessive, it may order a complete new trial or a new trial limited to the issue of damages. . . . [T]he court may condition a denial of the motion for a new trial upon the filing by the plaintiff of a remittitur, in a stated amount, and in this way give the plaintiff the option either of submitting to a new trial or accepting the amount of damages which the court considers justified . . . . The one important limitation on use of remittiturs is that they are not proper where the verdict was the result of passion and prejudice, since such prejudice may have infected all the decision of the jury.

3 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1305.1 (Wright ed. 1958) (footnotes omitted).

3. 693 S.W.2d at 101. The collapse occurred on July 17, 1981, killing 114 people and injuring scores of others. *Id.*

4. The amount of compensatory damages was the only issue of fact to be decided because Crown Center and others involved in the design, construction, ownership, and operation of the hotel entered into a settlement agreement with the representatives of those killed or injured in the skywalk collapse. *Id.* at 104-05. Crown Center and the other defendants admitted liability and agreed to pay a total of $20,000,000 in punitive damages to be distributed among the victims. *Id.* at 103, 104-05. In exchange, the plaintiffs agreed not to present evidence of the defendants' conduct. *Id.* at 105.

5. *Id.* at 101. The jury awarded the verdict to compensate Firestone for extensive head and spinal injuries suffered in the accident. Firestone, rendered a quadriplegic, spent seven months in medical facilities undergoing operations, tests, and rehabilitation. She continues to need constant medical attention, specialized equipment, and physical and emotional therapy. *Id.* at 109.

6. *Id.* at 101.

7. *Id.*

8. Crown Center requested reversal and remand for a new trial, or alternatively, a further reduction of the verdict to $7,500,000. *Id.*

Firestone cross-appealed[9] for restoration of the jury verdict.[10] The Missouri Court of Appeals affirmed the trial court's judgment and transferred the case to the Missouri Supreme Court.[11] The Supreme Court reinstated the jury verdict and *held*: the power of remittitur is "abolished" in Missouri.[12]

In the United States, Judge Story (later Justice Story) in *Blunt v. Little* became the first judge to exercise the power of remittitur.[13] Judge Story did not cite any authority or offer any justification for his exercise of this judicial power.[14] In 1866, the United States Supreme Court summarily approved of the power of remittitur in *Northern Pacific Railroad v. Herbert*.[15] In 1935, however, in *Dimick v. Schiedt*,[16] the Court questioned

9. Many courts will not allow a plaintiff to appeal after he has agreed to a remittitur. *See, e.g.*, Donovan v. Penn Shipping Co., 429 U.S. 648, 650 (1977) (per curiam) ("[A] plaintiff in federal court . . . may not appeal from a remittitur order he has accepted."). Missouri followed a similar rule: a plaintiff who consents to a remittitur may not question the validity of the court's order after accepting it. *See* Webb v. Rench, 476 S.W.2d 570, 573 (Mo. 1972); Carver v. Missouri-Ks.-Tex. R.R., 362 Mo. 897, 917, 245 S.W.2d 96, 105-06 (1952). In 1977, the Missouri Supreme Court modified that rule to allow appellate court review of the remittitur "as to excessiveness as well as inadequacy" when the defendant requests further remittitur. Means v. Sears, Roebuck & Co., 550 S.W.2d 780, 789 (Mo. 1977) (en banc). In 1981, the Missouri legislature codified that modification in Rule of Civil Procedure 78.10:

> Consenting to a remittitur as a condition to the denial of a new trial does not preclude the consenting party from asserting on appeal that the amount of the remittitur is excessive. A party consenting to a remittitur may not initiate the appeal on that ground but may raise the same on the other party's appeal.

Mo. R. Civ. P. 78.10.

10. 693 S.W.2d at 101.

11. *Id.*

12. *Id.* at 110. *See also* Kenton v. Hyatt Hotels Corp., 693 S.W.2d 83 (Mo. 1985) (en banc). *Kenton* also involved a personal injury suit arising from the collapse of Hyatt Hotel's skywalks. Citing *Firestone*, the Missouri Supreme Court reinstated the remitted portion of the jury verdict.

13. 3 F. Cas. 760 (C.C.D. Mass. 1822) (No. 1578) (Judge Story denied defendant's motion for a new trial when the plaintiff accepted a $500 remittitur on a $2,000 jury verdict).

14. Judge Story did cite two English cases in support of the court's power to grant a new trial if the court determines that damages are excessive. Hewlett v. Cruchley, 5 Taunt. 277, 128 Eng. Rep. 696 (1813); Chambers v. Caulfield, 6 East 244, 102 Eng. Rep. 1280 (1805). In *Chambers*, the court recognized a judicial duty to grant a new trial if the verdict indicated that the jury acted under the influence of prejudice, gross error, or misconception. 6 East at 256, 102 Eng. Rep. at 1285. In *Hewlett*, however, the court acknowledged that it is extremely difficult for the courts to interfere by granting a new trial. 5 Taunt. at 280-81, 128 Eng. Rep. at 698. Neither *Hewlett* nor *Chambers* resulted in a new trial.

15. 116 U.S. 642, 646-47 (1886). The Court stated that the power of remittitur was a matter within the discretion of the judge, citing *Blunt* and two state court cases, Hayden v. Florence Sewing Mach. Co., 54 N.Y. 221 (1873) (tenant agreed to remit the portion of the verdict that the appellate court found represented lost profits suffered as a result of a wrongful eviction) and Doyle v. Dixon, 97 Mass. 208 (1867) (in an action for breach of contract, plaintiff agreed to remit the portion of the

the authority and rationale behind the power.[17] Nevertheless, the Court reluctantly approved of the power in dicta, primarily because federal courts had uniformly applied the doctrine for more than a hundred years.[18]

Despite acceptance of the power by the Supreme Court, several lower courts have expressed concern that it may undermine the constitutional right to a determination of the facts by a jury.[19] Consequently, courts

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verdict that the trial judge found to be excessive). Neither state case referred to any common-law rule supporting the doctrine.

The Court continued to approve of the power of remittitur in subsequent cases. *See, e.g.*, Union Pac. R.R. v. Hadley, 246 U.S. 330, 334 (1918); Tevis v. Ryan, 233 U.S. 273, 290 (1914); Gila Valley G. & N. Ry. v. Hall, 232 U.S. 94, 103-05 (1914); German Alliance Ins. Co. v. Hale, 219 U.S. 307, 312 (1911); Koenigsberger v. Richmond Silver Mining Co., 158 U.S. 41, 52-53 (1895); Lewis v. Wilson, 151 U.S. 551, 555 (1894); Clark v. Sidway, 142 U.S. 682, 690 (1892); Kennon v. Gilmer, 131 U.S. 22, 29 (1889); Arkansas Valley Land & Cattle Co. v. Mann, 130 U.S. 69, 74 (1889).

16. 293 U.S. 474 (1935).

17. In the last analysis, the sole support for the decisions of this Court and that of Mr. Justice Story, so far as they are pertinent to cases like that now in hand, must rest upon the practice of some of the English judges—a practice which has been condemned as opposed to the principles of the common law by every *reasoned* English decision, both before and after the adoption of the Federal constitution, which we have been able to find.

Id. at 484 (emphasis in the original). *See also* Beardmore v. Carrington, 2 Wils. K.B. 244, 248, 95 Eng. Rep. 790, 792-93 (1764) (denying English courts the power to abridge damages in personal tort actions); Watt v. Watt, [1905] All E.R. 840, 843 (expressly overruling the few English cases that had approved of the remittitur power).

In *Beardmore,* the court drew a distinction between cases of liquidated damages, such as breach of contract, in which the damages may be objectively measured, and personal tort cases in which the damages are a matter of opinion. The court suggested that a judge may correct excessive verdicts in cases of liquidated damages, but not in tort cases. 2 Wils. K.B. 244, 248, 95 Eng. Rep. 790, 792. In *Watt,* the court abolished the doctrine in tort cases but did not address the propriety of remittitur in cases of liquidated damages.

18. In the light reflected by the foregoing review of the English decisions and commentators, it, therefore, may be that if the question of remittitur were now before us for the first time, it would be decided otherwise. But, first announced by Mr. Justice Story in 1822, the doctrine has been accepted as the law for more than a hundred years and uniformly applied in the federal courts during that time. And, as it finds some support in the practice of the English courts prior to the adoption of the Constitution, we may assume that in a case involving a remittitur, which this case does not, the doctrine would not be reconsidered or disturbed at this late day.

293 U.S. at 484-85.

19. *See, e.g.*, Bonura v. Sea Land Serv., Inc., 512 F.2d 671, 672-73 (5th Cir. 1975) (Goldberg, J., dissenting). *But see* Arkansas Land & Cattle Co. v. Mann, 130 U.S. 69, 74 (1889) ("The practice . . . [of remittitur] is sustained by sound reason and does not, in any just sense, impair the constitutional right of trial by jury.").

The seventh amendment provides for the right of trial by jury: "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII. For the Supreme Court's treatment of this issue, see *supra* note 48 and accompanying text. Missouri also guarantees a right to a jury trial: "The right of trial by jury, as heretofore enjoyed, shall remain inviolate." MO. CONST. art. I, § 28.

have imposed various limitations upon the judicial exercise of the remittitur power.[20] Several federal courts have limited the judge's discretion in setting reasonable damages in a remittitur action. For example, some courts have applied a "maximum reasonable award" standard.[21] Under this standard, a judge must award the plaintiff the maximum amount that the jury could have awarded.[22] Other courts have imposed a "minimum reasonable award" standard, under which a judge must reduce an excessive verdict to the minimum amount that the jury could have awarded.[23] Still other courts have allowed the trial judge to substitute his view of a reasonable award for the excessive jury verdict.[24]

Despite these limitations, the power of remittitur remains established within the federal and state court systems. Although rare instances exist in which state courts have refused to apply the doctrine,[25] an overwhelming majority of state courts exercise the remittitur power.

In 1831, the Missouri Supreme Court first recognized the power of remittitur in *McAllister v. Mullanphy*.[26] Sixty-three years later in *Burdict v. Missouri Pacific Railway*,[27] the court upheld the doctrine,[28] but two

20. *See, e.g.*, Kennon v. Gilmer, 131 U.S. 22, 28-29 (1889) (court cannot, according to its own estimate, reduce the amount of damages and enter an absolute judgment; it must give the plaintiff the choice of making a remittitur or accepting a new trial); Bonura v. Sea Land Serv., Inc., 512 F.2d 671, 673 (5th Cir. 1975) (Goldberg, J., dissenting) ("I would have the district court judge bear the burden of substantiating his estimation of damages by making findings of fact and explicating the theory or rationale for the damages.").

21. *See, e.g.*, Gorsalitz v. Olin Mathieson Chem. Corp., 429 F.2d 1033, 1043-46 (5th Cir. 1970) (trial court erred in substituting its view of a reasonable award instead of determining the maximum award that the jury could reasonably find). *See also* 3 BARRON & HOLSTOFF, FEDERAL PRACTICE AND PROCEDURE § 1305.1 (Wright ed. 1958) (describing the different standards used in determining the amount of the remittitur).

22. 429 F.2d at 1046.

23. *See, e.g.*, Meissner v. Papas, 35 F. Supp. 676, 677 (D.C. Wis. 1940), *aff'd*, 124 F.2d 720 (1941).

24. *See, e.g.*, Grobengieser v. Clearfield Cheese Co., 94 F. Supp. 402 (D.C. Pa. 1950); Raske v. Raske, 92 F. Supp. 348 (D.C. Minn. 1950).

25. *See, e.g.*, Louisville & N. R.R. v. Earl's Adm'x, 94 Ky. 368, 22 S.W. 607 (1893). The court stated that if an award is excessive, a new trial must be granted. Reduction of an excessive verdict by a trial judge is not permissible. A subsequent case, Chesapeake & O. Ry. v. Meyers, 150 Ky. 841, 845-46, 151 S.W. 19, 21 (1912), explained that the general rule stated in *Earl's Adm'x* does not apply when the items constituting the damages are separable, because the court can accurately determine those damages not properly recoverable. In such cases, the court may use the power of remittitur to correct the verdict.

26. 2 Mo. 28, 28 (1831) ("[T]he plaintiff in ejectment may enter a remittiter [sic], where the finding is for too much, to avoid a new trial.").

27. 123 Mo. 221, 27 S.W. 453 (1894) (en banc). In *Burdict*, the trial court overruled the defendant's motion for a new trial after the plaintiff agreed to remit a portion of the jury verdict. On

strong dissents challenged the remittitur power as an unconstitutional infringement on the right to a jury trial.[29] One dissenting judge[30] argued that the remittitur power should not be exercised at the appellate level because appellate courts have no power to review questions of fact, such as the proper sum to be awarded as compensation for pain and suffering in personal injury cases.[31] As the final reviewing authority on disputed issues of fact, the trial judge, on the other hand, could grant a remittitur.[32] Another dissenting judge[33] argued that the remittitur power contravenes the general rule that the responsibility of assessing damages is wholly within the province of the jury.[34] The judge noted that the power might be exercised with respect to liquidated damages because the granting of liquidated damages is a question of law rather than of fact.[35]

For a period of ninety-one years after the dissenting opinions in *Burdict*, no Missouri Supreme Court opinion expressly advocated abolishing the power of remittitur in Missouri. In *Firestone v. Crown Center Redevelopment Corp.*,[36] however, the Missouri Supreme Court abolished the power. Judge Higgins, writing for the majority,[37] found the trial judge's remittitur an abuse of discretion.[38] He noted that the jury is

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appeal, the court still found the damages excessive and ordered a reversal unless the plaintiff would agree to a further reduction. The case was transferred to the Missouri Supreme Court, which affirmed the additional reduction and approved the power of remittitur.

28. *Id.* at 238-43, 27 S.W. at 456-58. Justice Black, writing for the majority, stated that although conflicting authorities existed, the trend of modern judicial opinion was to allow the power of remittitur at both the trial and appellate levels. The remittitur power, according to Justice Black, allowed the court to "work out substantial justice by avoiding, as far as possible, the long delays and accumulated costs incident to reversals and repeated trials." *Id.* at 242-43, 27 S.W. at 458.

29. *Id.* at 243-70, 27 S.W. at 458-66.

30. *Id.* at 243-59, 27 S.W. at 458-63 (Barclay, J., dissenting).

31. *Id.* at 245, 27 S.W. at 459.

32. *Id.* at 259, 27 S.W. at 463 ("In Missouri, the trial courts are the final reviewing authorities on disputed issues of fact, in law cases, and have been for many years . . . . The responsibility for that part of the administration of justice rests upon them, and not with this court.").

33. *Id.* at 260-70, 27 S.W. at 463-66 (Gantt, J., dissenting).

34. *Id.* at 260, 27 S.W. at 463.

35. *Id.* at 261, 27 S.W. at 463 (when the damages are unliquidated, "[i]t is the peculiar province of the jury to decide such cases under appropriate instructions from the court; and the law does not recognize in the latter the power to substitute its *own* judgment for that of the jury.") (emphasis in the original).

36. 693 S.W.2d 99 (Mo. 1985) (en banc).

37. *Id.* Chief Judge Rendlen, Judges Billings and Donnolly, Special Judge Dowd, and Senior Judge Morgan joined the majority opinion. Judge Welliver dissented. Judges Gunn and Blackmar did not take part in the decision. *Id.* at 110.

38. *Id.*

vested with broad discretion in fixing fair and reasonable compensation,[39] and the evidence of Firestone's injuries supported the fifteen million dollar jury verdict.[40] Therefore, the record did not authorize the trial court in its exercise of reasonable discretion to order a remittitur.[41]

After reversing the trial court for abuse of discretion, the Missouri Supreme Court concluded that the power of remittitur should be abolished.[42] Judge Higgins noted that no rule or statute provided for the power of remittitur.[43] Moreover, courts had applied the doctrine inconsistently, resulting in irreconcilable case-by-case evaluations.[44]

The Court explained that abolishing the power of remittitur would not eliminate the trial court's ability to control jury verdicts.[45] Trial courts could still grant a new trial if the verdict was excessive or if the verdict was against the weight of the evidence.[46]

In light of the strong commitment to trial by jury in the United States,[47] the Missouri Supreme Court's decision to prohibit future judicial readjustments of jury verdicts appears prudent. Arguably, the power of remittitur allows the judge to infringe upon the plaintiff's right to a jury trial because the plaintiff is forced to accept a judgment less than that awarded by the jury.[48] The inconsistent results obtained through

39. *Id.* at 109-10 (citing Graeff v. Baptist Temple of Springfield, 573 S.W.2d 291, 309 (Mo. 1978)).

40. *Id.*

41. *Id.* at 110.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* *See* MO. R. CIV. PROC. 78.02 ("Only one new trial shall be allowed on the ground that the verdict is against the weight of evidence."). The court cited MO. R. CIV. PROC. 78.01, which expressly authorizes the judiciary to grant a new trial:

> The court may grant a new trial of any issue upon good cause shown. A new trial may be granted to all or any of the parties and on all or part of the issues after trial by jury, court or master. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact or make new findings, and direct the entry of a new judgment.

47. *Id.* In Dimick v. Schiedt, 293 U.S. 474, 485-86 (1935), Justice Sutherland stated:

> The right of trial by jury is of ancient origin, charterized by Blackstone as "the glory of the English law" and "the most transcendent privilege which any subject can enjoy". . . . Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

48. The Supreme Court has declared that a plaintiff's right to a jury trial is not undermined by the remittitur power, in part because the plaintiff can still choose to undergo a new trial. Dimick v. Schiedt, 293 U.S. 474, 486 (1935). Arguably, however, a plaintiff has little or no choice in the matter. Injured plaintiffs may feel pressured into agreeing to a remittitur in order to pay medical

remittitur strongly suggest that a judge is no better able to assess damages than a jury.[49] This is especially true in personal injury cases, like *Firestone*, when damages compensate for injuries that are difficult to assess, such as pain and suffering and emotional distress. Thus, unless the judge believes that damages are so excessive as to require a new trial on every issue, perhaps the judge should rely on the jury's determination of what fairly and reasonably compensates the plaintiff for injuries sustained.

The *Firestone* court's broad prohibition, however, suggests that the court's holding may extend beyond personal injury cases. The language of the opinion indicates that the court intended to abolish the remittitur power at both the trial and appellate levels and for awards of liquidated damages as well as unliquidated damages.[50] Previous cases questioning the power of remittitur as an unlawful usurpation of the jury's function, however, often approved of the power for awards of liquidated damages.[51] In that situation, the remittitur power allows the judge to correct blatant errors in the verdict without causing the unnecessary expense of a

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expenses and to avoid the additional expenditures of time that another trial would require. Still, abolishing the power of remittitur would force plaintiffs to accept the additional expense of a new trial and perhaps a lower verdict. On the other hand, if the next verdict is the same, the plaintiff, defendant, and court have all spent additional time and money to reach the same result. Furthermore, this verdict will have to stand, *see* MO. R. CIV. PROC. 78.02, *supra* note 46, even though the court has decided the verdict is unlawfully excessive.

49. *Compare Kenton, supra* note 12, *with Firestone.* Although both Firestone and Kenton were injured in the Hyatt skywalk collapse, the extent of their injuries differed. Kenton suffered a broken neck, causing initial paralysis. Surgery and treatment have enabled her to walk with crutches, but she continues to suffer from weakness, sensory loss, reduced breathing capacity, and other physical and emotional traumas. She will continue to need physical and psychiatric care. 693 S.W.2d at 97. The jury awarded Kenton $4,000,000 in compensatory damages, but the trial judge ordered a $250,000 remittitur. Kenton agreed to the remittitur, but sought reinstatement of the jury verdict when the defendant appealed. *Id.* at 85-86. Arguably, the jury verdicts, not the remittiturs, are inconsistent. In *Burdict,* the majority opinion upheld the doctrine of remittitur in part because "[c]ommon experience teaches us that verdicts differ widely . . . [and the court] is in a position to be able to judge when a verdict is so far beyond those usually allowed in like cases as to be excessive." 123 Mo. at 242, 27 S.W. at 458. Therefore, the disparity between the *Firestone* remittitur and the *Kenton* remittitur may be the result of the trial court's effort to reconcile two inconsistent jury verdicts.

50. *Firestone* failed to distinguish between liquidated and unliquidated claims. Personal injury cases usually involve unliquidated claims because damages are a matter of opinion. Breach of contract cases normally involve liquidated claims in which the law determines the damages. *See* Beardmore v. Carrington, 2 Wils. K.B. 224, 248, 95 Eng. Rep. 790, 792-93 (1764).

51. *See, e.g., id. See also* Burdict v. Missouri Pac. Ry., 123 Mo. 221, 260-70, 27 S.W. 453, 463-66 (Gantt, J., dissenting). The *Firestone* court cited Judge Gantt's dissent in *Burdict* with approval. Arguably then, the *Firestone* holding may be limited to personal injury cases.

new trial.[52]

Although *Firestone* failed to explore the power of remittitur in depth, the Missouri Supreme Court nevertheless has become the first court to abandon a doctrine accepted in every jurisdiction in the United States. Future Missouri decisions may strictly interpret *Firestone* to apply only to awards of compensatory damages in personal injury cases. If the court's decision prompts other courts to reconsider the doctrine, *Firestone* will stand as a landmark decision for the abolishment of the remittitur power.

A.L.H.

52. In Hayden v. Florence Sewing Mach. Co., 54 N.Y. 221 (1872), a wrongful eviction case, the court allowed the jury to consider both damages to the plaintiff's property and damages to his business in the form of lost profits. The jury included both elements in its verdict. The court determined that it was error as a matter of law to allow the jury to include lost profits in its verdict. The court corrected the verdict by merely deducting the sum representing the lost profits. The plaintiff, knowing that a new trial would result in the court's withholding the issue of lost profits from the jury, agreed to the remittitur.